

In the Matter of)
)
Process Reform Report) GN Docket No. 14-25

SUMMARY

We congratulate the report's authors and the Commission on its efforts so far in this area.

Marcus Spectrum Solutions LLC (MSS) is the consulting practice of Michael J. Marcus, Sc.D., F-IEEE, a retired FCC senior executive who worked at the Commission nearly 25 years in both the spectrum policy and enforcement areas. His qualifications are well known to the Commission¹. He was recently awarded the 2013 IEEE

1

Communications Society Award for Award for Public Service in the Field of Telecommunications.² He regularly publishes a blog, *SpectrumTalk*³, that is probably the most comprehensive independent blog on spectrum policy and spectrum reform as well as writing a regular column on spectrum policy issues for *IEEE Wireless Communications Magazine*, published by the IEEE Communications Society, “the premier international forum for the exchange of ideas on communications technologies and information networking”⁴. As an adjunct professor of electrical and computer engineering at Virginia Tech, he teaches a course on spectrum policy for innovative wireless engineers. In 2012-2013 he was chair of IEEE-USA Committee on Communications Policy and coordinated the drafting of a white paper “Clarifying Harmful Interference Will Facilitate Wireless Innovation”⁵ and a position statement on “Improving Spectrum Policy Decisions in the Period 2013-2017”⁶, both topics closely related to this proceeding.

These comments do not necessarily represent the view of any client and are being submitted purely in the public interest. Indeed, MSS has no clients that have participated in this proceeding. These comments are motivated by the experience of Dr. Marcus during his FCC career and his interest in the maintaining US competitiveness in advanced wireless technology.

The sections below are organized by the recommendations in the report. In general MSS supports all the recommendations, but urges the Commission to be more explicit or go further in certain areas to advance the public interest.

² <http://www.comsoc.org/about/memberprograms/comsoc-awards/telecom/bios>

³ <http://www.marcus-spectrum.com/Blog/Blog.html>

⁴ <http://www.comsoc.org/about/overview>

⁵ <http://ieeeusa.org/policy/whitepapers/IEEEUSAWP-HarmfulInterference0712.pdf>

⁶ <http://ieeeusa.org/policy/positions/SpectrumPoilcy1112.pdf>

Recommendation 1.1: Efficient Intake Analysis and Relevant Timelines

This recommendation is a key one and is strongly supported. In particular we urge the Commission to promptly implement the multiple comments that were received dealing with petitions for rulemaking. The report summarized these as:

Either put out Petitions for Rulemaking and Petitions for Declaratory Ruling for comment immediately upon receipt, if procedurally sound, or dismiss such petitions on an expedited basis.

The right to petition the government is embedded in the First Amendment as well as the APA⁷. Further the longstanding provisions of §1.403 are clear and simple:

All petitions for rule making ... meeting the requirements of § 1.401 will be given a file number and, promptly thereafter, a “Public Notice” will be issued (by means of a Commission release entitled “Petitions for Rule Making Filed”) as to the petition, file number, nature of the proposal, and date of filing, Petitions for rule making are available at the Commission's Reference Information Center, 445 12th Street, SW, Washington, DC and may also be available electronically over the Internet at <http://www.fcc.gov/>. (Emphasis added)

There is really no need for a recommendation or new procedure here. What is needed is consistent compliance with these longstanding provisions for prompt review of petitions.⁸ Many new technologies need petitions to change the Commission’s rules that did not anticipate them. §7 of the Act makes clear “It shall be the policy of the United States to encourage the provision of new technologies and services to the public.” Lax procedures for handling such petition disadvantages US entities seeking to offer advanced technologies. They do not seek or expect automatic Commission approval of their proposals, but only timely treatment. Indeed, the prospect of endless regulatory

⁷ 5 USC §553(e)

⁸ *SpectrumTalk* published a post in July 2013 revealing the hidden corner of ECFS where many petitions were in “limbo” pending review.
<http://www.marcus-spectrum.com/Blog/files/PetitionLimbo713.html>

delays in the petition greatly complicates capital formation for innovators that need nonroutine FCC approvals

Recommendation 3.12: Consider Listing Specific Questions with Rebuttable Presumptions at the End of an NPRM

The recommendation deals with NPRMs, but should apply to other procedures such as NOIs and the increasing number of comments requested by public notices. *SpectrumTalk* published a post in December 2013 entitled “Do FCC NOIs/NPRMs Have Too Many Poorly Organized Questions?”⁹ that is closely related to this issue. It pointed out that questions in FCC agenda items grow rapidly during coordination between bureaus and offices and with the “8th Floor”. Adding a question is an easy way to get concurrence, but the process gets out of control. The post gives as an example the “Wireless Innovation” NOI, Docket 09-157¹⁰:

This document, a high priority of the previous Chairman, has 167 questions that end in a question mark. There are even 2 questions in footnotes to other question. (fn. 53 & 69. Note that fn. 53 seems to be irrelevant to the rest of the NOI and possibly was just inserted in the wrong document.) Former Commissioner Copps had an additional 11 questions in his statement. FCC staff also is fond of using the phrase “we seek comment” in sentences that do not end in a question mark but still constitute questions. There are 40 questions that use this construction. There are an additional 5 questions that use alternative formats.¹¹

⁹ <http://www.marcus-spectrum.com/Blog/files/Questions1213.html>

¹⁰ http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-09-66A1_Rcd.pdf

¹¹ The alternative format questions in the NOI are:

-Thus, we seek, as a general matter, comments regarding the spectrum requirements that are needed to foster innovation in wireless networks and systems. (para. 25)

-In particular, we solicit comment on the extent to which secondary market transactions result in the introduction of new and innovative services. (para. 33)

-Commenters should, in particular, discuss how such information might be collected and made transparent to promote effective sharing.(para. 43)

This explosion of questions greatly complicates life for both commenting parties and FCC staff who try to draw conclusions. The Commission needs to exert more discipline in limiting questions in order to make them an effective interchange of information.

In the blog post we give examples from requests for comments from Ofcom and Industry Canada (IC), the UK and Canadian telecom regulators, that seem better structured than the FCC approach typified by the Wireless Innovation NOI. Below are examples of their formatting:

3.67 All these developments underline how international cooperation on spectrum management, especially at the European level, will remain critical to securing the delivery of benefits from spectrum use in the UK. In key recent spectrum initiatives, including our work on the 700 MHz band,⁴⁵ we have emphasised the need to take an internationally coordinated approach to decisions relating to future spectrum use in order to promote economies of scale and interoperability, as well as to ensure efficient use of spectrum. In future, we will continue to take an active role towards ensuring coordination with other National Regulatory Authorities, as well as contributing to the work of international institutions at both European and global levels.

Question 1: Have we captured all the major trends that are likely to impact spectrum use over the next ten years in this section and the separate Appendix on sectoral developments? Are there other market, technology or international developments that could lead to significant changes in spectrum demand and supply over the next 10 years?

-We encourage commenters to identify unlicensed technologies that may be under development, and to discuss how we can promote further innovations in the use of unlicensed spectrum under our Part 15 rules.(para.45)

-Accordingly, we encourage commenters to consider how policies for innovation in the wireless domestic market might appropriately reflect or support global innovation for international networks generally. By business model, we refer to a framework for converting technology to economic value. (para. 61)

Figure 1: Ofcom consultation¹² example

19. Industry Canada also proposes to treat any deemed spectrum licence transfer as an actual licence transfer, division, or subordinate licensing arrangement. Given that current conditions of licence require that Industry Canada approve all spectrum licence transfers, it is proposed that licensees will be required to notify Industry Canada prior to finalizing a deemed spectrum licence transfer. Such notification would be treated as a spectrum licence transfer request, which will be reviewed by the Department as set out in this document. It is further proposed that, where Industry Canada indicates that it would refuse the approval, a licensee would be in breach of its conditions of licence if it finalizes the agreement related deemed spectrum licence transfer.

20. At any time, licensees may informally approach the Department with questions as to how these criteria and considerations might be applied to a particular request.

Industry Canada is seeking comments on:

6-1 The criteria and considerations set out above.

6-2 Whether there is a threshold in the form of concentration or a measure of MHz-pop that Industry Canada should apply in deciding whether to conduct a detailed review, or some other type of threshold, screen, or cap that should be used to decide if a detailed review is required.

6-3 The treatment of deemed spectrum licence transfers as actual transfers, divisions or subordinate licensing arrangements.

6-4 The current review model, which is confidential, and whether it should be modified such that Industry Canada would publicize a spectrum licence transfer request and provide an opportunity for third party input.

6-5 In addition, Industry Canada welcomes comments on any other suggested changes to the applicable conditions of licence related to licence transfers, and to section 5.6 of [CPC-2-1-23](#) and to the relevant application forms or other requirements.

Figure 2: Industry Canada consultation¹³ example

The key issues for question is not whether they are at the end of documents, but rather are they easy to identify, are they grouped by subject matter, and is the number explicitly limited to focus on the key issues at hand. Both Ofcom and IC group their questions by subject matter and number them. The simple act of numbering questions creates managerial accountability on the growth of the question pool – something clearly lacking at present.

Recommendation 3.6: Continue to Engage with Other Agencies to Develop Best Practices for Rulemakings

We fully support this recommendation. Historically the Commission has seen itself as a unique entity in the federal government. But it is not the only regulator of

¹² http://stakeholders.ofcom.org.uk/binaries/consultations/spectrum-management-strategy/summary/spectrum_management_strategy.pdf

¹³ <http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10597.html>

technical industries in the world and it is not the only independent federal regulatory commission. It should learn best practices from others. For example, it might want to engage other agencies on the issue of why its *ex parte* procedures differ so completely from those of other agencies.¹⁴

It should engage other technical regulatory agencies on the role of advisory committees in their deliberations. For example, FDA, NRC, and EPA have technical advisory committees that differ significantly from the FCC's TAC in structure. In those agencies the advisory committees play a key role in decisionmaking because they are composed of experts who are not representatives of parties appearing before the agencies – rather they are industry retirees and academics paid for part time work by the agencies after being vetted for no conflicts of interest. This results in a cost to the agency, but the FCC is now incurring major penalties to the GDP in its repeated delays in dealing with new wireless technology issues. The following table¹⁵ submitted in Docket 09-157 gives an indication of present delays:

¹⁴ The Commission briefly considered this difference in the R&O in Docket 10-43. It concluded at that time that

“Other agencies may be differently situated to the extent their docket is primarily adjudicatory rather than rulemaking (e.g., the Federal Trade Commission). Also, staff summaries raise an issue of fairness. The complex legal and technical nature of the issues sometimes presented *ex parte* make it preferable for the parties arguing those issues to summarize them.” (Emphasis added) R&O&FNPRM, Docket 10-43, February 2, 2011 at para. 71 Thus at that time the Commission did not look very hard for comparable agencies in the federal government. We welcome the new openness.

¹⁵ Comments of Mitchell Lazarus, Docket 09-157, September 30, 2009 (<http://apps.fcc.gov/ecfs/document/view?id=7020039921>)

| Docket No. | Request | Start | End | Duration |
|---|--|-------------------------|------------|-------------------|
| WT 04-143 | rulemaking – adding narrower bandwidths to 18 GHz fixed service band | 05/04/2001 ^a | 12/29/2006 | 66 mos. |
| ET 98-156 | rulemaking – directional unlicensed power at 24 GHz | 10/20/1997 | 02/13/2002 | 52 mos. |
| WT 07-54 | rulemaking – smaller antennas in 11 GHz fixed service band | 07/14/2004 | 10/31/2007 | 39 mos. |
| ET 99-231 | rulemaking – unlicensed Wi-Fi “g” standard (digital modulation devices) | 02/17/2000 ^b | 07/25/2002 | 27 mos. |
| ET 06-195 | waiver – UltraVision Security Systems perimeter security device | 10/06/2006 | 11/20/2008 | 25 mos. |
| ET 04-373 | waiver – SafeView security screening device | 08/18/2004 | 08/04/2006 | 24 mos. |
| WT 09-114 | rulemaking – conditional licensing on additional channels in 23 GHz fixed service band | 11/07/2007 | (pending) | 23 mos. (to date) |
| ET 00-47 | rulemaking – software-defined radios | 03/21/2000 | 02/04/2002 | 22 mos. |
| WP 08-63 | waiver – ReconRobotics surveillance robot | 01/11/2008 | (pending) | 20 mos. (to date) |
| WT 09-114 | rulemaking – adding wider bandwidths to 6 GHz fixed service band | 02/04/2008 | (pending) | 20 mos. (to date) |
| WP 09-2 | waiver – L-3 CyTerra public safety radar | 02/22/2008 | (pending) | 19 mos. (to date) |
| NOTES (a) Date of <i>ex parte</i> statement in IB Docket No. 98-172 proposing 18 GHz channel plan. (b) Date on which Wi-LAN, Inc. filed an Application for Review of denial of certification of an OFDM device under § 15.247. The Commission effectively treated that application as a petition for rulemaking. <i>Spread Spectrum Devices</i> , 16 FCC Rcd 10036 (2002). | | | | |

If a paid advisory committee, similar to ones at NRC, FDA, and EPA could speed technical deliberations as it does at other agencies it could be a net benefit for the whole economy! Note that such an alternative advisory committee would also further the goals of Recommendation 3.5: Increase Access to External Technical Experts and Recommendation 3.4: Consider Additional Mediation and/or Other Dispute Resolution Techniques to Narrow Issues in Controversy and Find Solutions.

While this recommendation deals with “other agencies”, presumably meaning other federal regulatory agencies, we urge the Commission to explore the practices of other national telecom regulators. For example, we show above the “consultation” formats used by Ofcom and IC and have suggested that their format for questions is better than

present FCC practice.

We have also written previously¹⁶ that the hypertext legal decisions produced by the North Dakota Supreme Court¹⁷ are a more appropriate format for FCC NPRMs and R&Os than the present FCC format. (While the Commission must produce a version of its agenda items in a format that the *Federal Register* will accept, IC now issues documents in both hypertext and a more traditional .pdf format comparable to present FCC format.¹⁸ Thus it seems likely that FCC could produce hypertext documents used by most parties as well as an archival *Federal Register* version without too much of a burden. At present the *Federal Register* versions already are generally different than the version initially released by FCC.)

Thus we hope that in considering “other agency” practices the Commission looks “beyond the Beltway” and considers effective foreign agencies as well as pioneers like the North Dakota Supreme Court.

Recommendation 3.3: Consider Whether a “Negotiated Rulemaking” Process Could be Useful to Narrow Issues and Develop Proposed Rules for Commission Consideration

We support this recommendation, BUT negotiated rulemaking has never been successful at FCC - although it has been at other agencies. I believe this persistent failure of NegReg at FCC is due to its *ex parte* culture that differs from all other federal agencies. This was discussed in a 2009 blog post that is attached herein at Attachment

¹⁶ <http://www.marcus-spectrum.com/Blog/files/Questions1213.html>

¹⁷ Here is an example - <http://www.ndcourts.gov/court/opinions/20130056.htm>

¹⁸ Here is a pair in the 2 formats:

<http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10597.html>

[http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/DGSO-002-13-consultation-march2013.pdf/\\$file/DGSO-002-13-consultation-march2013.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/DGSO-002-13-consultation-march2013.pdf/$file/DGSO-002-13-consultation-march2013.pdf)

1. The recommendation of this blog post is that additional attempts at NegReg be under the direction of a commissioner chosen by the Commission and given delegated authority to quickly resolve the question at hand under delegated authority¹⁹ *if* the Neg/Reg breaks down - as all previous ones have at FCC. The key to making parties compromise in Neg/Reg is the realization that they do not have another chance to engage in endless *ex parte* meetings on the 8th Floor – Neg/Reg should be the time for their “best and final offer”. Absent this or an alternative approach, Neg/Reg will continue to fail in the FCC as presently structured.

Recommendation 2.22: Improve Tracking and Analysis of Complaint Data for Internal Commission Use

We agree here also, but would like to make a specific addition for the issue of “emerging interference sources”. In today’s complex spectrum environment, new sources of interference appear from time to time that are legal under rules that are in effect. This is not negligence, it is the inevitable result of rapid technological growth and technical deregulation. The only alternative would be a detailed and lengthy review of every new product for its impact on all parts of the spectrum.

Examples of past emerging interference sources are the police radar detectors that caused interference to VSAT downlinks, the “cellular boosters” that caused interference to cellular base stations, oscillation-related interference²⁰ from set top indoor TV antennas with amplifiers to cellular, GPS, and other systems, and the ongoing issue of

¹⁹ Section 5(c)(1) of the Communications Act (47 USC 5(c)(1)) allows the Commission to "delegate any of its functions" to "an individual commissioner".

²⁰ http://www.broadcastingcable.com/blog/BC_DC_Eggerton_on_Washington/32627-First_Person_FCC.php,
<http://www.shakespeare-marine.com/antennas/safetyalert-tvantennas.asp>,
<http://www.uscg.mil/auxiliary/publications/alcoast/alcoast-298-03.asp>

FM broadcast station harmonic interference to 700 MHz cellular base stations²¹.

Frankly, the Commission has a poor track record in dealing with such emerging problems. The case of Docket 10-4 dealing with the cellular booster is a good example²². While it is unclear when the Commission's staff *first* heard of this issue, it is clear that CTIA made a formal presentation²³ to senior FCC staff on May 1, 2006. At that time CTIA stated "FCC Action is urgently needed". The Report and Order adopting rules to address this issue was not adopted until February 20, 2013²⁴, nearly 7 years after CTIA's first formal presentation to FCC! Indeed, a recent Order²⁵ delays the effective date of the rules addressing this issue until April 30, 2014, making the total delay just a day short of 8 years. Considering that previous equipment can still be used until it actually causes interference and probably has a life time of 5-10 years, this "urgent" problem will likely continue until 2024.

There are two types of delays involved here, although they are related. From the CTIA presentation in 2006 to the release of the NPRM in Docket 10-4²⁶ almost 5 years transpired. The corresponding delay in the radar detector/VSAT case is hard to document, but we believe that parts of the Commission were aware of the problem for

²¹ "FM Broadcast -> 700 MHz LTE Interference Problem Reveals Basic FCC Spectrum Policy Problems", *SpectrumTalk*, February 13, 2014(<http://www.marcus-spectrum.com/Blog/files/FM2LTEint214.html>)

²² "Docket 10-4: 6+ Years of FCC Inaction Turns an Emerging Interference Issue into a 'Lose/Lose' Situation", *SpectrumTalk*, July 09, 2012, http://www.marcus-spectrum.com/Blog/files/104lose_lose.html

²³ Dated presentation is an attachment to this petition: http://files.ctia.org/pdf/filings/FINAL--CTIA--_Jammers_Petition_for_Declaratory_Ruling.pdf

²⁴ http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-21A1_Rcd.pdf

²⁵ http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0211/DA-14-177A1.pdf

²⁶ http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-53A1_Rcd.pdf

more than a decade before the initiation of Docket 01-478 in October 2001²⁷.

We urge the Commission to address the issue of emerging interference by publishing on a regular basis, trends in reported interference mechanisms independent of whether they violate an existing rule. Many of these mechanism will be odd events worthy of benign neglect and not worthy of new regulations. But that classification should be made with knowledge of the interference and interaction with spectrum users who can provide information on the impact of the interference adopted. At present, this information is just not available from the Commission nad may be available only poorly with the Commission.

The ongoing problem of FM interference to 700 MHz base stations²⁸ is documented only in an Enforcement Bureau Notice of Violation²⁹ issued by the New York District Office that is virtually impossible to find on the Commission's website. However industry sources tell us that there are roughly 100 similar ongoing interference issues that all raise complex technical and legal issues. Such problems should be shared within the Commission and with the public on a regular basis.

²⁷ NPRM, Docket 01-478, October 15, 2001, at Para. 11-14 (The NPRM states at para. 11 “More recently, however, we have received a number of reports of interference caused to very small aperture satellite terminals (VSATs) by mobile receivers designed to detect the presence of police radar (‘radar detectors’). (Emphasis added) We have personal knowledge - gained while working at the Commission - that the Commission staff was aware of this situation at least a decade earlier.

²⁸ <http://www.marcus-spectrum.com/Blog/files/FM2LTEint214.html>

²⁹ Notice of Violation issue to Willpower Radio, L.L.C., WKZE-FM, Salisbury, CT, EB Case No. 13-00009298, NOV No.: V201332380007 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-321765A1.pdf) (Finding this notice requires knowledge of the URL of EB's previous home page on the Commission's website. The Commission's website search engine can not find it either.

Recommendation 3.14: Obtain Economic, Technical and Enforcement Input Early in Rulemakings

We urge the Commission to consider 2 suggestions made in the IEEE-USA Policy

Statement on “Improving U.S. Spectrum Policy Deliberations in the Period 2013-2017”³⁰.

These are:

1. “FCC and NTIA should supplement their existing Technological Advisory Council (TAC) and Commerce Spectrum Management Advisory Committee (CSMAC), which consist mainly of representatives of major communications firms, with a new advisory committee that serves both agencies and focuses on independent review of options for resolving spectrum conflicts and identifying outdated policies. The new group should be modeled on the EPA Science Advisory Board and the NRC Advisory Committee on Reactor Safeguards and members should have the necessary security clearances to deal with issues involving classified federal government spectrum users, if so requested.

Both FCC’s TAC and NTIA’s CSMAC have been implemented with members who are in most cases representatives of affected parties. While this representation is beneficial in many cases -- in reviewing what affected parties want and how they might be impacted by possible decisions -- it does not give the agencies all the options that are possible with today’s and future technologies.

FCC has never even asked the TAC to recommend or evaluate options on pending docketed proceedings. On the NTIA side, the CSMAC charter has no provisions for classified deliberations showing that NTIA is not using it for reviewing pending government/federal spectrum policy matters.

FCC and NTIA should supplement the existing committees with a new advisory committee patterned after the prestigious committees that serve NRC and EPA consisting of distinguished members without immediate conflicts (e.g., academics and retirees who have agreed to limit their consulting activities, in exchange for payment as special government employees). A committee that advises both agencies will be a cost-effective way to make sure both are presented with technology policy options, and that their impacts have been evaluated in an objective fashion. The FCC commissioners and the NTIA administrator can then combine this input with more subjective factors in making national interest determinations and policy decisions.”

2. “FCC and NTIA should have the resources to contract with the National Academy of Science’s National Research Council (NAS/NRC), Federally Funded Research and Development Centers (FFRDCs) and private analysis contractors, to supplement their internal staffs on novel technical policy questions where they lack the appropriate internal resources.

Other federal regulatory agencies with technical jurisdiction have resources that can be used to supplement their permanent staff capabilities, with studies on new technologies and their

³⁰ <http://ieeeyusa.org/policy/positions/SpectrumPoilcy1112.pdf>

policy issues. Both FFRDCs and NAS/NRC are often used by other agencies, yet FCC and NTIA lack the funds to use these resources. As a result proceedings in innovative technologies often drag on for years. Also the two agencies lack the resources to review regularly existing technical policies to see if they have become anachronistic with today's technologies. While NTIA has the Institute for Telecommunications Sciences (ITS) as an internal resource, most ITS activities are actually studies for other agencies, while FCC and NTIA have minimal resources to use this "internal FFRDC."

An example of how outside resources have been used to resolve contentious technical policy issues and guide US policy on to a new path in the past is the 1970 NAS/NRC study that recommended a technical solution to the telephone interconnection issue.

This NAS/NRC study set the basic framework for Part 68 of the Commission's Rules, which in turn, was the foundation for telephone interconnection rules in many other countries.

More recently the MITRE Corporation, an FFRDC, did a study in 2001 for FCC, ordered by special legislation, to recommend alternatives for resolving the contentious unprecedented technical issues in the 12 GHz terrestrial/direct broadcast satellite spectrum sharing proceeding (often referred to as "Northpoint"), ET Docket 98-206.

These MITRE recommendations then formed the basis for the Multichannel Video Distribution and Data Service rules that FCC adopted in 2002, some of the most technically complex rules FCC has ever adopted.

Thus, in both the Part 68 and MVDDS cases, outside independent resources were used to resolve technically complex, contentious issues in a timely way."

SECTION 7

While the Commission has a clear policy for implementing the forbearance waivers of §10(c) of the Act³¹, it has no clear policy for handling the new technology provisions of §7³². Stated simply, new technology is a key factor in economic growth and uncertainty about timeliness for considering new technology discourages capital formation for such technology.

We urge the Commission to clarify how it will implement the mandate of §7, which is now 30 years old. If the Commission believes that the provisions of §7 are impractical, it should notify Congress and request repeal or a modification of the text.

³¹ 47 C.F.R. §§1.53,59

³² 47 U.S.C. §157

CONCLUSIONS

We welcome the opportunity to comment on this important and promising report.
We believe the suggestions above will improve the Commission's functions to the
economic benefit of the country.

/s/

Michael J. Marcus. Sc.D., F-IEEE
Director
Marcus Spectrum Solutions LLC
Cabin John MD 20818
February 26, 2014

cc: Comm. Ajit Pai
Comm. Jessica Rosenworcel
Nicholas Degani
David Goldman
Julius Knapp
Diane Cornell
Joe Monie

Attachment 1

Originally published October 28, 2007

(<http://spectrumtalk.blogspot.com/2007/10/negotiated-rulemaking-why-it-fails-at.html#links>)

Negotiated Rulemaking: Why it Fails at FCC

Negotiated Rulemaking (sometimes called Neg/Reg) is an alternative to traditional notice and comment rulemakings. It is a member of a family of techniques known as a "[Alternative Dispute resolution](#)"/ADR. Neg/Reg is a voluntary process for drafting regulations that brings together those parties who would be affected by a rule, including the Government, chartered as an advisory committee under the Federal Advisory Committee Act, to reach consensus on some or all of its aspects before the rule is formally published as a proposal.

Congress was so interested in this approach that in 1990 it passed the [Negotiated Rulemaking Act](#) to remove any uncertainty about the legality of this approach, establish guidelines and requirements, and encourage its use. The fact that it has been used four times recently by the [Department of Education](#) shows that it is not out of favor in the Bush Administration. So why doesn't the FCC use it? Simply because it has never been successful at FCC in the past. But there is little insight on why it works at other agencies and not at FCC. In this post I will discuss my theory.

I was heavily involved in the FCC's abortive efforts to use Neg/Reg for the "Big LEO" rule making that developed the rules for Iridium and other MSS systems. That effort foundered on an error the responsible senior FCC staffer made: He assumed that in case of deadlock that the advisory committee could act on majority vote. Unfortunately, Motorola had read the legislation better than he had and even hired a former law school professor of the Common Carrier Bureau Chief to explain that any outcome other than consensus must be agreed upon at the beginning of the advisory committee.

The agencies where Neg/Reg has worked successfully, such as EPA and Labor are all Executive branch agencies with a unitary head, as opposed to multimember regulatory commissions. The Nuclear Regulatory Commission [has used Reg/Neg](#)³³ for about a decade.)

The theory behind Neg/Reg is that the directly affected parties meet face to face and in the spirit of [Getting to Yes](#) they negotiate tradeoffs with each other that minimize their "pain". They do this in fear that if they do not meet consensus the government decision maker will make some other set of tradeoffs that does not balance their concerns as well.

In Executive Branch agencies there is a sole decision maker, e.g. Secretary of Labor, who may or may not be directly accessible to the parties in the rule making. In the case of FCC there is a 5 member commission more accessible to major corporations than many agency heads. Thus there is always a hope that the commissioners might be more favorable than tradeoffs with one's opponents on the committee. The "Big LEO" deliberations were further complicated by the fact that there was a vacant commissioner's seat at FCC at the time so it was easy to rationalize that the next commissioner would agree with your position. Hence the parties could not reach closure.

I suggest the Commission try to avoid this problem of having a multimember Commission that can reopen the all issues if negotiations fail by using the provision of Section 5(c)(1) of the Communications Act (47 USC 5(c)(1)) which allows the Commission to "delegate any of its functions" to "an individual commissioner". Thus it could establish a Neg/Reg committee to work on a new rule and at the same time establish a backup plan that Commissioner X is delegated to resolve the issue expeditiously if the negotiations fail. The key here is to scare the parties into resolving things expeditiously by making the

³³ <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/1995/95a-01.html>

necessary compromised among themselves. While this solution is not always in the public interest*, it often is. In any case, a timely decision is often better than a very lengthy "optimum" one where the costs of delay outweigh the benefits of optimality. This is especially true with new technologies that move at Internet speed while FCC decision making goes at a much slower pace.

=====

* I recall a decision in the late 1980s dealing with increasing the power of educational FM stations at the lower end of the FM broadcast band. TV channel 6 licensees, directly below this band, were concerned about possible interference and privately negotiated a compromise with the education FM crowd. They jointly presented it to the Commission. While the Commission accepted most of the package of compromises, they modified them slightly in favor of the education FMers stating that "compromises negotiated directly between the directed affected parties are often, but not always, in the public interest." In particular they stated concern that the TV channel 6 licensees were more powerful and had great resources than the FMers and thus could not negotiate as equals.